

RESOLUTION NO. 1740

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF FIFE, PIERCE COUNTY, WASHINGTON AUTHORIZING A SETTLEMENT AGREEMENT WITH GRAYBEARD HOLDINGS, LLC AND MMH, LLC

WHEREAS, in 2014 the City adopted Ordinance 1872 which prohibited locating businesses in the City of Fife that sold marijuana and marijuana retail products; and

WHEREAS, MMH, LLC and Graybeard Holdings, LLC (collectively "MMH") appealed Ordinance 1872, and the Pierce County Superior Court, in Pierce County Superior Court Case No. 14-2-10487-7, *MMH, LLC v City of Fife* upheld the validity of Ordinance 1872; and

WHEREAS, MMH appealed the court's decision and that appeal is now pending before the Washington State Court of Appeals Division II, and it has been assigned Case No. 90780-3, *MMH, LLC et al v City of Fife et al.*; and

WHEREAS, since the adoption of Ordinance 1872 there have been several significant developments, the most significant of which are:

1. The Puyallup Tribe of Indians has recently announced that it has obtained permission from the State of Washington to conduct retail sales of marijuana and marijuana infused products on their reservation, and the City of Fife is located entirely within the Puyallup Tribe reservation boundaries, thus effectively defeating the purpose of Ordinance 1872.

2. The Puyallup Tribe of Indians has announced that it intends to immediately open a Retail Marijuana Outlet at an existing building located in the City of Fife next to the intersection of two major arterial streets.

3. At the time that Ordinance 1872 was passed there was no information relating to the impacts on local services, including police services, from having a Retail Marijuana Outlet located within a community in the State of Washington. Now there is significant evidence to support the position that the impacts on local public services is no greater than, and in some cases less than, other retail businesses in the community.

4. At the time Ordinance 1872 was passed the taxing scheme of the State of Washington imposed a significant tax on Retail Marijuana Outlets, but shared none of it with the local jurisdictions within which the stores were to be located. Since the adoption of Ordinance 1872, the State of Washington has modified the tax scheme so that it now shares a significant portion of tax revenues generated from retail marijuana sales with the communities within which a Retail Marijuana Outlet is located, thus making up for the lost revenues to the community and providing funding for needed public services.

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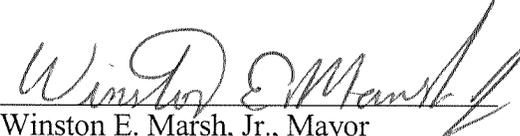
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WHEREAS, given the above changed conditions and the expense of continuing litigation, there appears to be no practical reason to continue with the litigation; and

WHEREAS, the City and MMH have negotiated an agreement to allow for the dismissal of the pending litigation upon such terms and conditions as are fair and reasonable to the City and MMH, as more fully set forth in the Agreement attached hereto as Exhibit A; now, therefore

BE IT RESOLVED that the City Council hereby approves the Settlement Agreement between the City of Fife, Graybeard Holdings, LLC and MMH, LLC attached hereto as Exhibit A and authorizes the City Manager to execute the Agreement on behalf of the City.

ADOPTED by the City Council at an open public meeting held on the 11th day of October, 2016.


Winston E. Marsh, Jr., Mayor

Attest:

for  - Deputy City Clerk
Carol Etgen, City Clerk

**SETTLEMENT AGREEMENT BY AND BETWEEN THE CITY OF
FIFE, GRAYBEARD HOLDINGS, LLC and MMH, LLC**

1. **Date and Parties.** This document (“Agreement”) is dated, for reference purposes only, the 7 day of OCTOBER, 2016, and is entered into by and between the City of Fife, a Washington municipal corporation, (the “City”), Graybeard Holdings, LLC, a Washington limited liability company, (“Graybeard”), and MMH, LLC, a Washington limited liability company.

2. **Definitions.**

2.1 “Store Location” shall be defined as the address commonly known as 5303 Pacific Highway East, Fife, Washington.

2.2 “Retail Marijuana Outlet” shall be defined as a retail business licensed in accordance with all applicable Washington state statutes for sale of retail marijuana and marijuana infused retail products.

2.3 “MMH” shall refer to MMH and Graybeard collectively, as well as any of the heirs, successors and assigns of the owners of MMH and Graybeard.

3. **General Recitals and Agreement Purpose.**

3.1 In 2014 the City adopted Ordinance 1872 which prohibited locating businesses in the City of Fife that sold marijuana and marijuana retail products.

3.2 MMH appealed Ordinance 1872, and the Pierce County Superior Court, in Pierce County Superior Court Case No. 14-2-10487-7, *MMH, LLC v City of Fife* upheld the validity of Ordinance 1872.

3.3 MMH appealed the court’s decision and that appeal is now pending before the Washington State Court of Appeals Division II, and it has been assigned Case No. 90780-3, *MMH, LLC et al v City of Fife et al.*

3.4 Since the adoption of Ordinance 1872 there have been several significant developments, the most significant of which are:

3.4.1 The Puyallup Tribe of Indians has recently announced that it has obtained permission from the State of Washington to conduct retail sales of marijuana and marijuana infused products on their reservation, and the City of Fife is located entirely within the Puyallup Tribe reservation boundaries, thus effectively defeating the purpose of Ordinance 1872.

3.4.2 The Puyallup Tribe of Indians has announced that it intends to immediately open a Retail Marijuana Outlet at an existing building located in the City of Fife next to the intersection of two major arterial streets.

3.4.3 At the time that Ordinance 1872 was passed there was no information relating to the impacts on local services, including police services, from having a Retail Marijuana Outlet located within a community in the State of Washington. Now there is significant evidence to support the position that the impacts on local public services is no greater than, and in some cases less than, other retail businesses in the community.

3.4.4 At the time Ordinance 1872 was passed the taxing scheme of the State of Washington imposed a significant tax on Retail Marijuana Outlets, but shared none of it with the local jurisdictions within which the stores were to be located. Since the adoption of



Ordinance 1872, the State of Washington has modified the tax scheme so that it now shares a significant portion of tax revenues generated from retail marijuana sales with the communities within which a Retail Marijuana Outlet is located, thus making up for the lost revenues to the community and providing funding for needed public services.

3.4.5 Given the above changed conditions and the expense of continuing litigation, there appears to be no practical reason to continue with the litigation.

3.4.6 The purpose of this Agreement is to allow for the dismissal of the pending litigation upon such terms and conditions as are fair and reasonable to the City and MMH, as more fully set forth in this Agreement.

4. **Conditions Precedent to Agreement becoming Effective.** This Agreement shall not become binding upon the City of Fife until: 1) the dismissal of MMH's appeal in the above referenced case, with prejudice and without costs; 2) the payment to the City by MMH the sum of thirty five thousand dollars (\$35,000.00), in order to defray a portion of the expenses incurred by the City in upholding the legality of Ordinance 1872; and 3) the entry of an order in the above referenced Superior Court case approving the Agreement terms and directing MMH and the City to comply with its terms. If all three of these conditions are not met by November 15, 2016, then this Agreement is null and void.

5. **Duties and Obligations of MMH.** MMH is obligated to do the following:

5.1 Prepare and process through the applicable court system all pleadings necessary to satisfy the conditions precedent listed in Agreement paragraph 4.

5.2 Pay to the City of Fife the sum listed in Agreement paragraph 4.

5.3 Upon dismissal of the lawsuit, but prior to opening the Retail Marijuana Outlet referenced in Agreement paragraph 6, obtain a Fife business license, and then maintain such license in good standing so long as it operates a Retail Marijuana Outlet within the City.

5.4 Prior to opening the Retail Marijuana Outlet referenced in Agreement paragraph 6, meet all state requirements necessary for opening said Retail Marijuana Outlet, and then remain in compliance so long as it operates the Retail Marijuana Outlet referenced in Agreement Paragraph 6.

5.5 If the City chooses to amend Ordinance 1872 such that the above referenced Retail Marijuana Outlet becomes a non-conforming use, as referenced in paragraph 6.4 below, then MMH shall operate said business in compliance with the City's non-conforming use restrictions.

6. **Duties and Obligations of the City.** Once the conditions precedent set forth in Agreement Paragraph 4 are satisfied, the City is obligated to do the following:

6.1 The City will not object to MMH opening a Retail Marijuana Outlet at 5303 Pacific Highway East, Fife, Washington, so long as said MMH complies with the terms and conditions set forth in this Agreement.

6.2 So long as MMH is otherwise eligible for a Fife Business License, and MMH submits to the City a complete business license application, the City will issue to MMH a business license to operate a Retail Marijuana Outlet at 5303 Pacific Highway East, Fife, Washington.

6.3 Upon MMH satisfying the conditions precedent listed in the Agreement Paragraph 4, the City shall cause to be initiated the public process to consider modifying Ordinance 1872.

6.4 Upon completion of the public process referenced in Agreement paragraph 6.3, the City shall adopt such modifications to Ordinance 1872 as the City Council, in its sole discretion, determines necessary and appropriate as an exercise of its police powers to protect the public health and welfare. If, at the end of the process, the Council does not amend Ordinance 1872, or amends it, but the Retail Marijuana Outlet referenced in Agreement Paragraph 6.2 is not in a location that is permitted by the new ordinance, then said retail outlet shall be considered a non-conforming use, as said term is defined in the Fife Municipal Code, including any subsequent amendments thereto, for all non-conforming uses, and the City shall allow said business to continue to operate so long as it continues to comply with the conditions of a non-conforming use, and also continues to comply with the conditions listed in Agreement section 5.

7. **Notice.**

7.1. Any demand, request or notice which any party hereto desires or may be required to be made or delivered to the other shall be in writing and shall be deemed given when personally delivered, or successfully transmitted by facsimile transmission, or sent by email and verified received by the recipient, or when actually received after being deposited in the United States Mail in registered or certified form, return receipt requested, addressed as follows:

If to MMH:

Edward Wetherbee
12517 101st Ave. Ct. NW
Gig Harbor, WA 98329-7284
Telephone: (253) 514-6183
Email: tw@thewetherbeegroup.com

With a copy to:

Mark D. Nelson, Esq.
Law Office of Mark D. Nelson
7901 Skansie Avenue
Suite 240
Gig Harbor, Washington 98335-8349
Telephone: (253) 858-8985
Email: mark@marknelsonlaw.com

If to the City:

Subir Mukerjee
City Manager
5411 23rd Street East
Fife, Washington 98424
Telephone: (253) 922-2489
Email: smukerjee@cityoffife.org



With a copy to:

Loren D. Combs
City Attorney
VSI Law Group, PLLC
225 Tacoma Avenue South
Tacoma, Washington 98403
Telephone: (253)922-5464
Email: ldc@vsilawgroup.com

7.2 The above contact information may be changed by either party by sending the new information to the other party at the addresses set forth above. The change shall be effective upon receipt of the information.

8. **Captions**. The captions of this Agreement are for convenience of reference only and shall not define or limit any of the terms or provisions hereof.

9. **Governing Law**. This Agreement shall be governed by and construed in accordance with the laws of the State of Washington, and venue and jurisdiction for any dispute shall be the Pierce County Superior Court.

10. **Severability**. The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions hereof, and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted.

11. **Time of the Essence**. The time for performance of the parties hereunder is of the essence of this Agreement. Strict compliance with the timelines is a material and substantial considerations for the Parties entering into this Agreement.

12. **Binding Effect**. This Agreement and the terms, covenants, benefits and duties set forth herein shall inure to the benefit of and be binding upon the parties, their heirs, successors, legal representatives and assigns of each of the parties.

13. **No Waiver**. No waiver of any default under this Agreement shall constitute or operate as a waiver of any subsequent default hereunder, and no delay, failure or omission in exercising or enforcing any right, privilege or option under this Agreement shall constitute a waiver, abandonment or relinquishment thereof or prohibit or prevent any election under or enforcement or exercise of any right, privilege or option hereunder.

14. **Entire Agreement**. The parties have negotiated in good faith with regards to each and every term of this agreement. This agreement embodies all agreements, representations and warranties to which the parties have agreed to be bound. This agreement shall be construed to accomplish the intent and purpose set forth herein, and shall be presumed to have been drafted by all parties hereto. There are no verbal or other agreements that modify or affect this Agreement unless specifically referenced herein. This Agreement may not be amended or modified in any respect whatsoever except by instrument in writing signed by the parties hereto.

15. **Attorney Fees and Specific Performance**. Both parties have entered into this

Agreement in good faith and intend to comply with each and every provision. However, in the case that litigation is commenced, the prevailing party shall be entitled to an award of attorney fees and costs against the other party for the attorney fees incurred by the prevailing party since the date that any demand letter was sent to the non-prevailing party to demanding compliance with the Agreement terms or seeking monetary compensation from the other party for alleged damages that allegedly were sustained as a result of a breach of the Agreement. The Parties acknowledge that they agree specific performance is an appropriate equitable remedy should either Party fail to comply with any of the timelines set forth herein.

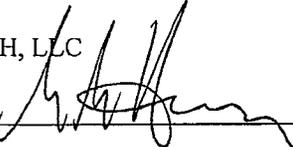
16. No Presumption of Draftsmanship. The Agreement has been drafted after negotiations between the parties. No presumption or rule construing ambiguity against the drafter of the document shall apply to the interpretation or enforcement of the Agreement.

17. Facsimile Transmission and Counterpart Signatures. Facsimile transmission of any signed original document, and retransmission of any signed facsimile transmission, shall be the same as delivery of an original. At the request of any party, or the escrow agent, if one exists,

CITY OF FIFE, WASHINGTON

By: _____
Subir Mukerjee
City Manager

MMH, LLC

By:  _____

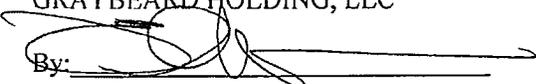
Name: Michael M. Hensley

Title: owner

Attest:

By: _____
Carol Etgen
City Clerk

GRAYBEARD HOLDING, LLC

By:  _____

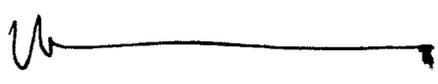
Name: EDWARD WETHERBEE

Title: OWNER

Approved as to form:

By: _____
Loren D. Combs
City Attorney

Approved as to Form:

By:  _____

Mark D. Nelson
Attorney for MMH and Graybeard